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KHOR PENG CHAI & ORS

v.

BANK NEGARA MALAYSIA & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2-25-425-2010]
8 FEBRUARY 2011

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ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash decision of first respondent in issuing freezing notices pursuant to s. 44 Anti-Money Laundering Act 2001 (AMLA) - Whether decisions made under statutory body reviewable under O. 53 Rules of the High Court 1980 - Whether court slow to interfere with enforcement matter of*

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statutory body - Whether s. 44 AMLA part of investigation of crimes in administration of criminal justice in Malaysia - Whether wrong to interfere with first respondent's power to investigate offences under s. 4(1) AMLA - Whether leave granted

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This was an application by the applicants for leave to commence judicial review for, *inter alia*, an order of *certiorari* to quash the decision of the first respondent in issuing or causing to be issued freezing notices pursuant to s. 44 of the Anti-Money Laundering Act 2001 (AMLA). Briefly, the facts were that the applicants were

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involved in a business of trading in consumer goods between Malaysia and China. By an order dated 28 July 2010, in suspecting that there were reasonable grounds to suspect that an offence under s. 4(1) of the AMLA had been committed, the first respondent froze the bank accounts of all of the applicants

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pursuant to s. 44 AMLA. Dissatisfied, the applicants filed the present application. The question that arose was whether the circumstances of this case allowed the court to grant leave to commence judicial review.

Held (dismissing the applicant's application with costs):

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(1) It is settled law that not all decisions, particularly ones that are made under statutory authority, are reviewable under O. 53 Rules of the High Court 1980. A decision must go beyond what is merely administrative or procedural. (para 13)

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(2) The court must be very slow to interfere with the enforcement matter of a statutory body and in so doing, refraining them from carrying out their responsibilities. In the realm of administration of criminal justice in Malaysia, the approach is two pronged *ie*, investigation of crimes and the prosecution of criminal cases in court. The investigation of crime is the responsibility of the enforcement agency whilst the prosecution is solely in the hands of the Attorney-General, who has the power exercisable at his discretion to institute, conduct or discontinue any criminal proceedings (art. 145(3) of the Federal Constitution and s. 376 of the Criminal Procedure Code). The decision to prosecute is solely legal, with public interest as the paramount consideration. Section 44 of AMLA is clearly part of the investigation of crimes in the administration of criminal justice in Malaysia. (paras 14 & 15)

(3) It would be wrong for the court to step in and bring to an end the first respondent's power to investigate offences under s. 4(1) AMLA. This would result in an all investigation process of the first respondent *via* s. 44 of AMLA to be open to constant judicial review. There would be much chaos and confusion when the courts are allowed to interrupt and usurp the functions and jurisdictions of enforcement agencies at this early stage of investigation. This was against public interest. (paras 16 & 17)

(4) This court refused to grant a stay of the first respondent's freezing order because there was a possibility of the dissipation of the moneys in the said bank's accounts. Release of the frozen bank accounts may be sufficient for the applicant to transfer money out of the country and effectively insulate the money from investigation. Leave herein should not be granted. (para 20)

Case(s) referred to:

R v. Director of the Serious Fraud Office, ex p Corner House Research [2008] UKHL 60 ***(refd)***

R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 ***(refd)***

Legislation referred to:

Anti-Money Laundering Act 2001, ss. 4(1), 44, 50

Criminal Procedure Code, s. 376

Federal Constitution, arts. 8(1), 145(3)

Rules of the High Court 1980, O. 53 r. 3

A *For the applicants - Michael Chow (Derek Chong with him); M/s Stanley Augustin & Co*
For the respondent - Nadia Hanim Mohd Tajuddin (Nor Hisham Ismail with him); AG's Chambers
Mohd Riduan Bakar (Peter & Mohd Sukri with him)

B *Reported by Suhainah Wahiduddin*

JUDGMENT

C **Mohd Zawawi Salleh J:**

Introduction

[1] This is an application by the applicants for leave to commence judicial review for the following relief:

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(a) a declaration that the s. 44 of Anti-Money Laundering Act, 2001 ("AMLA") violates art. 8(1) of the Federal Constitution and is accordingly illegal, null and void and of no legal effect;

E (b) an order of *certiorari* to quash the decision of the 1st respondent in issuing or causing to be issued the said freezing notices dated 28 July 2010 pursuant to s. 44 of the AMLA;

F (c) consequential to these, an order for 1st respondent to revoke the said freezing orders dated 28 July 2010 including issuing notices to all the financial institutions where the respective accounts, being the subject matter of the said freezing orders are maintained.

G (d) any other relief and/or order deemed just and appropriate.

(e) costs.

[2] Upon hearing the parties and reading the relevant submissions and cause papers, I dismissed the applicants' application on 28 October 2010 with RM5,000 costs to the respondents. I now give my reasons for doing so.

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Background Facts

I **[3]** With the exceptions of the 4th applicant (who is a housewife) and the 13th applicant (who is a licensed moneylender), all the remaining applicants are involved in a business of trading in consumer goods mainly between Malaysia and China.

[4] By an order dated 28 July 2010, in suspecting that there are reasonable grounds to suspect that an offence under sub-s. 4(1) of the AMLA has been/is being committed, the 1st respondent froze the bank's accounts of all of the applicants pursuant to s. 44 of AMLA.

[5] The applicants wrote to the 1st respondent regarding the frozen accounts and there was some exchange of correspondence that took place. Several meetings were also held during which, some of the accounts of the applicants were released for the use of the applicants. Not satisfied with the bulk of the accounts being frozen, the applicants filed the present application.

[6] The court is not concerned to conduct enquiry into the facts which led to the respondent to issue the order dated 28 July 2010. It is not part of the court's function in these judicial review proceedings to achieve more complete account of the events, unless omission inhibits a correct legal conclusion.

The Leave Application To Commence Judicial Review

[7] Pursuant to O. 53 r. 3 of the Rules of the High Court 1980 ("RHC"), an application for judicial review must be preceded by a court order granting leave. The question before the court is whether the circumstances of this case would allow the court to grant leave to commence judicial review.

[8] Low Hop Bing, J (as he then was) in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398 had taken the task of laying down the principles governing application for leave under O. 53 in a dedicated sub-heading in the said judgment. I reproduce the entire sub-heading for ease of reference:

> Principles Governing Application For Leave Under O. 53:
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> It is useful to revisit the principles which our courts have established in dealing with an application for leave to obtain the relief of judicial review by way of *certiorari* under O. 53 as follows:
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> (1) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(2) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(3) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted: see eg, *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725 HC, per Visu Sinnadurai J (as he then was); and *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 SC, per Edgar Joseph Jr SCJ (as he then was).

(4) The applicant must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application: per Ajaib Singh SCJ (as he then was) in *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC.

(5) An application will fail where there is an alternative remedy: *Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal For Ulu Kinta & Ors* [1971] 1 LNS 39; [1972] 1 MLJ 70 FC, per Chang Min Tat J (later FJ); on appeal to the Federal Court per Ong Hock Thye CJ (M), Ali FC and Ong Hock Sim FJ (as they then were); *Badat Drani v. Tan Kheat* [1953] 1 LNS 6; [1953] MLJ 67; *Melayu Raya Press Ltd v. WL Blythe The Colonial Secretary* [1951] 1 LNS 51; [1951] MLJ 89; *Government of Malaysia & Anor v. Jagdis Singh* [1987] CLJ 110 (Rep); [1987] 1 CLJ 451; [1987] 2 MLJ 185 SC. *Lim Kui Siam & Anor v. Pentadbir Tanah Daerah Kluang* [1995] 1 CLJ 846; and *T Mohan & Ors v. Pentadbir Tanah Daerah Petaling* [2000] 8 CLJ 567 per Abu Samah J.

(6) Where there is an alternative remedy of appeal, leave to issue *certiorari* will only be granted in exceptional circumstances such as:

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty;

(c) a serious breach of the principles of natural justice: see eg, *National Land Finance Co-operative Society Ltd v. Ketua Pengarah Hasil Dalam Negeri* [1998] 4 CLJ Supp 232 HC; per Nik Hashim J (now JCA);

(d) illegality: *Majlis Perbandaran*, *supra*,

(7) The categories of exceptional circumstances are not closed, and the burden is on the applicant to prove the existence of any of the exceptional circumstances: *Lim Kui Siam*, *supra*.

The Applicant's Application

[9] Now, bearing in mind of the above principles, let us revert to at the circumstances of the applicant's application.

[10] Submissions were advanced by learned counsel for the applicants and the objection submission to this application was filed by the learned Senior Federal Counsel appearing for the Attorney General's Chambers.

[11] The 1st respondent in this case had suspicion that the applicants has or is committing an offence under sub-s. 4(1) of the AMLA. Section 4(1) of AMLA is produced for ease of reference:

PART II

MONEY LAUNDERING OFFENCES

Section 4: Offence of money laundering.

(1) Any person who -

(a) engages in, or attempts to engage in; or

(b) abets the commission of,

money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.

[12] Upon such suspicion, the 1st respondent issued an order freezing the accounts of the applicants pursuant to s. 44 of AMLA. Section 44 of AMLA is reproduced below:

PART VI

FREEZING, SEIZURE AND FORFEITURE

Section 44: Freezing of property.

(1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence

A has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.

B **Court's Finding**

[13] It is settled law that not all decisions, particularly ones that are made under statutory authority, are reviewable under O. 53 RHC. Justice Hardie Boys in *R v. Sloan* [1990] 1 NZLR 474 has C explained this concept comprehensively when he said that it is not every decision made under statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural. This concept has been followed by many decisions in this court as well as the Court of Appeal.

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[14] The purpose of s. 44 of AMLA is to assist in investigation where there are reasonable grounds to suspect that an offence under s. 4(1) of AMLA has been / is being / is about to be committed. The issuance of the order dated 28 July 2010 by the E 1st respondent is to facilitate investigation and to secure and preserve evidence for the purpose of criminal prosecution under s. 4(1) of AMLA by freezing the applicant's accounts. When it is read together with s. 50 of AMLA, it also provides avenue for the 1st respondent, *via* the public prosecutor, to secure and to F preserve the evidence in relation to the commission of such offence, for the purpose of criminal prosecution under s. 4(1) of AMLA.

[15] The court must be very slow to interfere with the enforcement matter of a statutory body and in so doing, refraining G them from carrying out their responsibilities. In the realm of administration of criminal justice in Malaysia, the approach is two pronged, i.e investigation of crimes and the prosecution of criminal cases in court. The investigation of crime is the responsibility of the enforcement agency whilst the prosecution is solely in the H hands of Attorney-General, who has the power exercisable at his discretion to institute, conduct or discontinue any criminal proceedings (see art. 145(3) of the Federal Constitution and s. 376 of the Criminal Procedure Code). Nevertheless, the discretion by the Attorney-General can only be exercised based

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on the outcome of the investigation undertaken by the relevant enforcement agency. Upon receipt of the result of investigation from enforcement agency, the Attorney-General will decide whether to institute prosecution against a perpetrator of crime. If the investigation reveals insufficient evidence to prosecute the suspect, the Attorney-General will choose not to prosecute. The decision to prosecute is solely legal, with public interest as the paramount consideration. Section 44 of AMLA is clearly part of the investigation of crimes in the administration of criminal justice in Malaysia.

[16] It would be wrong for the court to step in and bring to an end the 1st respondent's power to investigate offences under s. 4(1) of AMLA. If the court is free to interrupt such investigation process, this will encourage tsunami of applications to cut short investigation process. This will result in all investigation process of the 1st respondent *via* s. 44 of AMLA be open to constant judicial review.

[17] I foresee much chaos and confusions when the courts are allowed to interrupt and usurp the functions and jurisdictions of enforcement agency at this early stage of investigation. This is against the public interest.

[18] On this issue, Lord Bingham of Cornhill said in *R v. Director of the Serious Fraud Office, ex p Corner House Research* [2008] UKHL 60 (30 July 2008):

> 30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service that is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and

investigator: *R v. Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 141; *R v. Director of Public Prosecutions, Ex p Manning* [2001] QB 330, para 23; *R (Bermingham) v. Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, paras 63-64; *Mohit v. Director of Public Prosecutions Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v. Director of Public Prosecutions* [2003] 4 LRC 712, 735-736; *Sharma v. Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest ground.

31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognized (as it was described in the cited passage of *Matalulu*).

> the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.

Thirdly, the powers are conferred in very broad and unprescriptive terms.

Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way.

[19] I do not consider it necessary to dispose of any other issue in this application given my conclusion that leave should not be granted.

[20] I also refused to grant a stay of the 1st respondent's freezing order because there is possibility of the dissipation of the moneys in the said bank's accounts. Release of the frozen bank's accounts – even for a few minutes – may be sufficient for the applicant to transfer money out of the country and effectively insulate the money from investigation.

Conclusion

[21] For the reasons above stated, I dismissed the applicant's application with cost of RM5,000 to the respondents.